No. 90-215

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

GRADY MICHAEL STROMAN,

Petitioner

v.

WEST COAST GROCERY COMPANY,
a Washington corporation,

Respondent

Petition for writ of certiorari to the United States Court Of Appeals For The Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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June 1, 1990

QUESTIONS PRESENTED

1. Whether a determination that a waiver of Title VII rights was "voluntary, deliberate, and informed" requires a due process evidentiary hearing at the trial level, when that issue is legitimately disputed.

2. Whether a Circuit Court of Appeals may determine that Title VII rights were "voluntarily, deliberately, and knowingly" waived, based solely on the release an offer of proof from the employer when such offer of proof was not subject to cross-examination or rebuttal.

LIST OF INTERESTED PARTIES

1. GRADY MICHAEL STROMAN, *Petitioner*

2. WEST COAST GROCERY COMPANY, *Respondent*

3. SUPER VALU STORES, INC., a Parent corporation of West Coast Grocery Company.

TABLE OF CONTENTS

Questions Presented	i.
List of Parties	ii.
Opinions Below	1.
Jurisdiction	2.
Statutes and Rules Involved	3.
Statement of the Case	3.
Reasons for Granting Writ	6.
Conclusion	14.
Appendix	
Opinion and Judgment of Court of Appeals	1a-1i
Denial of Rehearing	1j

TABLE OF AUTHORITIES

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)

Coventry v. United States Steel Corp., 856 F.2d 514 (3rd Cir. 1988)

Crooker v. California, 357 U.S. 433 (1958)

E. E. O. C. v. American Express Publishing Corp., 681 F.Supp. 216 (S.D.N.Y. 1988)

Jones v. Taber, 648 F.2d 1201 (9th Cir. 1981)

Kelley v. Southern Pacific Co., 419 U.S. 318, 331-332 (1974)

Miranda v. Arizona, 384 U.S. 436 (1966)

Pullman-Standard v. Southern Pacific Co., 456 U.S. 273 (1982)

Salmon v. United States, 724 F.2d 1357 (9th Cir. 1983)

Securities Exchange Comm. v. Chenery Corp., 332 U.S. 194, 214 (1947)

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Petition for writ of certiorari to the United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Grady Michael Stroman, respectfully prays that a writ of certiorari issue to review the judgments and the opinions of the Unites States Court of Appeals for the Ninth Circuit, reversing the District Court on August 31,

1989 and denying Petitioner's petition for rehearing on March 6, 1990. The opinions of the Ninth Circuit are published at 884 F.2d 458 and are reprinted in the appendix hereto, P. 1a *infra*. The order denying rehearing is not published, and is reprinted in the appendix hereto, P. 1g *infra*.

The Western District of Washington District Court (Tacoma) Findings of Fact and Conclusions of Law was not reported. That decision is reprinted in the appendix hereto, P. 1k *infra*.

JURISDICTION

Invoking jurisdiction under 42 U.S.C. Section 2000 (e), et. seq., the Petitioner brought suit in the Western District of Washington (Tacoma) on June 30, 1986.

The trial was on April 20, 1988 before the Court without a jury, and the Court granted judgment for the Petitioner in the amount of $101,378.48 for back pay and $190,073.40 for front pay, plus reasonable attorneys' fees. Judgment was entered on April 20, 1988 for $291,445.88.

On Respondent's appeal, the Ninth Circuit on August 31, 1989 entered judgment by a two-to-one vote reversing the trial court's decision and dismissing Petitioner's claim based upon a decision by the majority that Petitioner had voluntarily and knowingly released his claim as a matter of law. The dissenter determined that the issue of whether the release was voluntarily and knowingly entered into was a question of fact that had to be determined after an evidentiary hearing at the trial court. A motion for rehearing and for a decision en banc was filed and the Court by the same two-to-one vote denied both motions on March 6, 1990.

STATUTES AND RULES INVOLVED

Federal Rules of Civil Procedure, Rule 52

FINDINGS BY THE COURT

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT OF THE CASE

Petitioner was an employee of the Respondent since January 15, 1980. He began work as a part-time order selector and was switched to full time on September 28, 1981.

Beginning in early 1982, Petitioner made repeated requests to be trained for a position as a grocery warehouse supervisor in the scheduling office. An employee generally had to be recommended by his supervisors for training in the scheduling office. Petitioner's supervisors declined to recommend him for training.

Petitioner applied and was interviewed for a supervisor position in the scheduling office in April, 1985. He was not selected. As a result of his failure to obtain the position, Petitioner filed a discrimination charge with the Washington State Human Rights Commission (WSHRC) and the Equal

Employment Opportunity Commission (EEOC) alleging that he was denied the position because of his race. On June 12, 1985, Petitioner filed a second discrimination charge alleging retaliation because of the previous charge. In July, 1985, Petitioner again applied for a supervisor position, but was not selected.

Because of this failure to be selected, Petitioner became emotionally upset and asked for and was granted a voluntary medical leave of absence on August 5, 1985 because he was unable to continue employment in the perceived discriminatory atmosphere.

In and around October, 1985, the Petitioner heard that the Respondent had lost a contract and was laying off workers. Under the Union contract, Petitioner had seniority and would not be subject to the layoff. He decided that because of Respondent's perceived discrimination, he could not continue his employment with Respondent notwithstanding his seniority rights. Petitioner determined that he would waive his seniority rights in exchange for the Respondent treating him as an economic layoff, eligible for unemployment compensation.

With this in mind Petitioner, when recalled on November 1, 1985, requested a layoff from the Respondent and the Respondent agreed to lay him off. The Respondent asked the Petitioner to sign the following agreement:

> West Coast Grocery and Grady Michael Stroman agree to the following:
> 1. Mike will leave the Company on an economic layoff.
> 2. West Coast will not contest the unemployment benefits.
> 3. The employee's record will be cleared and information given out limited to date of hire, rate of pay, and

journeyman status.
4. The employee will have no recall rights.
5. The employee will be entitled to any accrued vacation and his share of Profit Sharing payable as defined by Federal Law, and the terms of the Profit Sharing Trust.
6. These terms represent a full and final settlement of any and all claims arising out of Mike's employment with West Coast Grocery.

The agreement, dated November 1, 1985, was signed by Petitioner, Mosley, and David Hamlin, the Operations Manager for West Coast.

Before the trial, the Respondent had moved for Summary Judgment on the issue of the release. The Petitioner filed three affidavits, C.P. 20, 52, 53, including his own to the effect that he was told that the release only related to his seniority rights and rights of recall under the Union Contract and that if he had believed that his discrimination claim would have been barred he would not have signed the release. The other affidavits supported the general understanding that the company was offering persons who had seniority an economic layoff if they wished to collect unemployment insurance in exchange for seniority rights. The Respondent had supported its motion for Summary Judgment with the affidavit of William Mosley. This affidavit of William Mosley was later entered in the record as an offer of proof at trial, and the Ninth Circuit relied on it in its opinion to conclude: (1) No coercion existed on signing the agreement; (2) Petitioner asked for the release; (3) Petitioner was asked whether he wanted an attorney.

The trial court denied the motion for Summary Judgment on the release, and determined at trial as a matter of law and without hearing evidence on the issue of voluntariness or knowing waiver, that the release on its face did not release

Title VII claims.

All three judges in the Court of Appeals agreed that the trial judge was wrong on the determination that the release as a matter of law could not cover Title VII claims. The two judge majority, on the other hand, went further. The two judge majority held:

1. The release as a matter of law, i.e., interpretation of the release, did include Title VII claims, and

2. The release was knowingly and voluntarily entered into by the Petitioner.

The second determination was based solely on the Mosley affidavit. Because the affidavit was used in an offer of proof, it was not subject to cross-examination or rebuttal testimony and affidavits.

The two-judge majority's reliance on an affidavit which is not subject to counter affidavits and testimony, or to cross-examination to determine two necessary elements under federal law relating to the effectiveness of a release of federal rights, violates both due process under the Fifth Amendment and the fact finding role of the trial court in violation of Rule 52 (a) of the Federal Rules of Civil Procedure, and it fails to properly recognize the separate functions of the trial court and the Court of Appeals.

REASON FOR GRANTING THE WRIT

The two-judge majority decision in this case is in conflict with the decisions of other Circuits and of this Court, and has so departed from the accepted standards of judicial proceedings as to call for the exercise of this Court's power of Supervision.

In cases involving the release of Title VII claims, the general rules are as the Ninth Circuit opinion set out on P. 462, Appendix Ie:

> (4) The determination of whether a waiver of Title VII was "voluntary, deliberate, and informed" is "predicated upon an evaluation of several indicia arising from the circumstances and conditions under which the release was executed." *Coventry v. United States Steel Corp.*, 856 F.2d 514, 522 (3d Cir. 1988), *see Salmeron*, 724 F.2d at 1362 (whether a release was voluntary must be determined from all the circumstances); *Taber*, 648 F.2d at 1203 (whether a release was voluntary depends on both objective and subjective factors). Of primary importance in this calculation is the clarity and lack of ambiguity of the agreement, *see Coventry*, 856 F.2d at 522, *Rogers*, 781 F.2d at 455-56, the plaintiff's education and business experience, *see Coventry*, 856 F.2d at 523, (quoting *EEOC v. American Express Publishing Corp.*, 681 F. Supp. 216, 219 (S.D.N.Y. 1988), "the presence of a noncoercive atmosphere for the execution of the release," *Taber*, 648 F.2d at 1204, *see also Salmeron*, 724 F.2d at 1362; *Coventry*, 856 F.2d at 523, and whether the employee had the benefit of legal counsel, *see Salmeron*, 724 F.2d at 1362, *Taber*, 648 F.2d at 1205; *Coventry*, 856 F.2d at 523.

As the quotation above indicates, all of these factors except the clarity and ambiguity of the release itself require parol evidence to establish whether the release was (1) voluntary, (2) plaintiff's education and business experience, presence of a noncoercive atmosphere for the execution of the release, and the benefit of legal counsel.

In addition to the factors mentioned above, this case

requires a trier of fact on the issue of voluntariness and knowledge, to consider the facts that: Petitioner was on medical leave for psychological reasons; and his financial condition after a two month layoff.

Based on the statement of law set out by the Ninth Circuit, and followed by the other circuits, it is clear that in every other circuit at this time, all of these issues would be decided by a trial court after a full hearing where all of the parties, including the party signing the release, would testify as to his understanding of what he was signing, the depth of his knowledge of his legal rights, and the duress or lack thereof caused by financial or other exigencies.

It is also clear that the entity determining such issues would be the trier of fact, either a jury in a case involving a jury or a judge where a jury was waived or not authorized because in the clash of testimony concerning knowledge and voluntariness the demeanor and credibility of the witnesses is crucial to such a determination.

Thus, under F. R. C. P. 52 (a), decisions concerning voluntariness and duress relate to factual determinations and may not be overturned unless they are clearly erroneous.

In this case, the two judge majority, instead of returning the case to the District Court as required by F. R. C. P. 52 (a) and existing precedent, said at 462 (Appendix Ie):

> "Based on his ruling that the agreement was a termination of work agreement, the district court precluded West Coast's counsel from examining either Stroman or Mosley regarding the conditions under which the agreement was signed. The court did, however, permit West Coast's counsel to make an offer of proof incorporating Mosley's affidavit. We conclude that the record as a whole sufficiently establishes the voluntariness of the

agreement and no purpose would be served by remanding the case to the district court to reconsider this issue."

The two judge majority did not consider that the same district court ruling precluded the Petitioner from cross-examining Mosley or from putting rebuttal in evidence through Petitioner's testimony or that of other witnesses, as he had done in the Summary Judgment hearing (C.P. 20, 52, 53).

The two judge majority relied entirely on this unexamined affidavit when it concluded at 463 (Appendix !f):

"In fact, Mosley, who was not permitted by the district judge to testify on this issue, indicated in his affidavit that he asked Stroman whether he wished to have an attorney read the agreement before signing and that Stroman responded that he did not. We therefor conclude that the contractual agreement released Stroman's Title VII discrimination claims, and that the release was a deliberate and informed waiver."

In fact, Petitioner's affidavit denied explicitly and implicitly most of that affidavit relied on by the Court of Appeals. Petitioner's affidavit stated in part:

"On November 4, 1985, I went into the Operations Office at about 10:00 a.m. Mr. Mosley concluded a meeting he was having with another employee, and said, "Come on in, Michael." No other words were spoken as the document was handed to me. Dave Hamlin's signature was already on the document. I took the document, read it, and no other words were spoken. I read the complete frame, and stated, "I'm not sure about this last one, Willie." Mosley did not say "That I did not see anything that bothered (me)." Affidavit of Mosley

> at Page 4, Paragraph 13. Mosley did not respond. He did not say "You ar giving up all claims against West Coast Grocery." Mosley affidavit at Page 4, Paragraph 13. He did not say that signing meant "No more suits." Mosley Affidavit at Page 4, Paragraph 15. I said, "Well, I guess trust has got to start somewhere."...If I had thought that Paragraph 6 of the Settlement Agreement offered by West Coast Grocery, which is the basis for this Motion, would have precluded my Washington State Human Rights charges and subsequent lawsuit, I would never have signed them. I would not have signed them if he had told me I was waiving Washington State Human Rights, Title VII, or RCW rights and remedies. The award of unemployment is totally disproportionate to the amount of injury, frustration, and damage I have suffered in this action."

Further, in Respondent's original brief to the Court of Appeals, the Respondent quotes at P. 19 Petitioner's deposition to the effect that:

> Michael Stroman testified in his deposition that he understood he had no seniority rights, no recall rights, and no job with West Coast Grocery after the November 1st agreement. (RT I-127 Offer of Proof). He thought he had a new job in California and that the unemployment benefits would "tide him over" until he could begin working there. (RT I-129 - 130).

It is clear that Petitioner believed that the release went only to seniority and recall rights, not to Title VII rights.

The Petitioner has not included these factual matters in the petition for the purpose of proving the truth of the matter, but to merely show that the dissenting judge was clearly correct when he said at 463 (Appendix If):

"I dissent, however, from the majority's factual determination that Stroman waived his Title VII rights knowingly and voluntarily.

"When an appellate court determines that a lower court made findings based upon an erroneous view of the law, the appellate court may not make contrary findings but must remand for new findings to be made in the light of the correct rule of law. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). This is not a game where an incorrect understanding of th law by the fact finder results in automatic granting of relief. Such a rule would require inefficient use of limited resources because the district court would have to make factual determinations in every case regardless of whether they are needed.

"The only exception to that rule is if 'the record permits only one resolution of the factual issue.' *Id.* citing *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331-332, 95 S.Ct. 472, 479-80. 42 L.Ed.2d 498 (1974). The majority presumes that Stroman waived his Title VII rights knowingly and voluntarily, but I do not believe that the record permits only one conclusion as to this matter.

"I would therefore remand for a determination as to whether the waiver of Title VII rights was made knowingly and voluntarily. It is the fact-finder, not us, who should determine these issues in the first instance."

It is clear that there is a conflict of testimony concerning the objective evidence related to Petitioner's understanding of what he was releasing when he signed the document. A determination of that issue is clearly for the trier of fact under Rule 52 (a) F. R. C. P., and not for the Court of Appeals.

Lastly the Court of Appeals in its discussion of Grady Stroman's background, on P. 462, 463 (Appendix Ie, If) is clearly reminiscent of the rejected view found in *Crooks v. California,* 357 U.S. 433 (1958), where this Court said at 438:

> "It is negated here by petitioner's age, intelligence, and education. While in law school he had studied criminal law; indeed, when asked to take the lie detector test, he informed the operator that the results of such a test would not be admissible at trial absent a stipulation by the parties. Supplementing that background is the police statement to petitioner well before his confession that he did not have to answer any questions. Moreover, the manner of his refusals to answer indicates full awareness of the right to be silent. On this record we are unable to say that petitioner's confession was anything other than voluntary."

This Court rejected this view when it overruled *Crooks* in *Miranda v. Arizona,* 384 U.S. 436, 479 fn.48, and recognized that in several legal matters even an intelligent layperson may be misled.

In is certainly not without question whether a lay person in the position of the Petitioner would understand that a full settlement of any and all claims arising out of Mike's employment with West Coast Grocery, included Title VII claims when this Court, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), refused to allow an arbitrator to preclusively decide violations of Title VII.

One must only consider that agreement to subject all disputes arising out of the employment relationship between Petitioner and Respondent to arbitration would not include Title VII claims, under *Alexander v. Gardner-Denver supra,*

to conclude by a parity of reasoning that an agreement to settle such disputes should not preclusively be determined to include such claims and further that a lay person would fully understand this distinction.

If such a rule is the law, one is reminded of Justice Jackson's dissent in *Securities Exchange Commission v. Chenery Corp.*, 332 U. S. 194 (1947) at 214, when he said, "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it'."

It is clear that in labor law, there are two sets of rights. First, those arising from common law and labor contracts, and second, those arising under the Civil Rights Act. The former are governed by state law and may be released, adjudicated, or arbitrated without reference to federal standards. The latter are peculiar federal rights, recognized as requiring special federal protections and require, as in the case of seamen's rights and other constitutional rights, special protections before they may be waived. Thus, it is clear that at a minimum, the determination that such rights have been "voluntarily, knowingly, and intelligently" waived, should occur only after a due process hearing where each party can present evidence and cross examine the other party, and that the assigned finder of fact who observed such evidence must make the determination under Rule 52 (a), F. R. C. P.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

RESPECTFULLY SUBMITTED,

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June 1, 1990

APPENDIX

884 FEDERAL REPORTER, 2d SERIES

STROMAN v. WEST COAST GROCERY CO.
Cite as 884 F 2d 458 (9th Cir. 1989)

Timothy J. Whitters, Seattle, Wash., for defendant-appellant.

J. Michael Galagher, Seattle, Wash., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, TANG and WIGGINS, Circuit Judges.

WIGGINS, Circuit Judge:

West Coast Grocery Company (West Coast) appeals from a judgment entered against it after a bench trial in this action under 42 U.S.C. § 2000e (1982) brought by appellee Grady Michael Stroman. This district court held that Stroman was denied training for a supervisory position because he was black. The court also held that Stroman was constructively discharged as a result of the actions of several of Stroman's supervisors. The court awaded Stroman $291,445.88 in back and front pay. We reverse the district court's judgment because Stroman's suit was barred by the terms of release agreement entered into by Stroman and West Coast.

I

Stroman began working with West Coast as a part time order selector on January 15, 1981. Stroman's job as an order selector consisted of identifying pallets of groceries in West Coast's warehouse and transporting the pallets to different shipping locations throughout the warehouse. He was switched to full time on

September 28, 1981.

Beginning in early 1982 Stroman made repeated requests to be trained for a position as a grocery warehouse supervisor in the scheduling office. An employee generally had to be recommended by his supervisors for training in the scheduling office. Stroman's supervisors declined to recommend him for training.

Stroman applied and was interviewed for a supervisor position in the scheduling office in April 1985. He was not selected. As a result of his failure to obtain the position, Stroman filed a discrimination charge with the Washington State Human Rights Commission (WSHRC) and Equal Employment Opportunity Commission (EEOC) alleging that he was denied the position because of his race. On June 12, 1985, Stroman filed a second discrimination charge alleging retaliation because of the previous charge. In July 1985 Stroman again applied for a supervisor position, but was not selected.

Stroman sought and obtained a voluntary medical leave of absence on August 5, 1985. In late October 1985, Stroman approached his supervisor Willy Mosley regarding the possibility of being put on economic layoff so that he could receive unemployment benefits. Although the economic layoff was meant only for part time employees, West Coast agreed to place Stroman on economic layoff status. In exchange West Coast required Stroman to enter into the following agreement:

West Coast Grocery and Grady Michael Stroman agree to the following:

1. Mike will leave the Company on an economic lay-off.
2. West Coast will not contest the unemployment benefits.
3. The employee's record will be cleared and information given out limited to date of hire, rate of pay, and journeyman status.
4. The employee will have no recall of rights.
5. The employee will be entitled to any accrued vacation and his

share of Profit Sharing payable as defined by Federal law, and the terms of the Profit Sharing Trust.
6. These terms represent a full and final settlement of any and all claims arising out of Mike's employment with West Coast Grocery.

The agreement, dated November 1, 1985, was signed by Stroman, Mosley, and David Hamlin, the Operations Manager for West Coast.

On December 2, 1985, Stroman filed a third discrimination charge alleging that West Coast failed to promote Stroman to the July 1985 superior position because of his race. Stroman filed this suit on July 31, 1986, alleging that he was denied training and promotion because of his race. He also stated a claim of retaliation and constructive discharge. During trial, the district court held that the November 1, 1985, agreement as a "termination of work" agreement and not a release of claims against West Coast. The court apparently based its conclusion on the fact that Stroman was still employed when he signed the agreement and no lawyers had yet become involved, and also because the statement contained in paragraph six that the agreement represented a "full and final settlement of any and all claims" did not explicitly mention Title VII. Concluding that is was a termination of work agreement, the court held that the agreement was admissible only to show discriminatory intent. *See, Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1342 (9th Cir.1987), *cert. denied*, — ,U.S. — , 108 S.Ct. 785, 98 L.Ed.2d 870 (1988).

The district court further held that West Coast's decision not to train Stroman was racially motivated, and that Stroman was constructively discharged because of the actions and conduct of West Coast. The court awarded Stroman $101,372.48 in back pay. The court awarded Stroman $101,073.40 in front pay "due to corporate hostility" toward Stroman. This timely appeal followed.

We have jurisdiction over this action under 28 U.S.C. § 1291 (1082).

II

"A general release of Title VII claims does not ordinarily violate public policy. To the contrary, public policy favors voluntary settlement of employment discrimination claims brought under Title VII."[1] *Rogers v. General Elec. Co.*, 781 F.2d 452, 454 (5th Cir.1986) (citations omitted); *cf. Ahern v. Central Pac. Freight Lines*, 846 F.2d 47, 48 (9th Cir.1988) (noting "overriding public interest in settling and quieting litigation" in action for securities and RICO violations). We nevertheless must closely scrutinize a waiver of rights under Title VII because of their remedial nature. *See Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1352 (11th Cir.1983).

[1] The interpretation and validity of a release of claims under Title VII is governed by federal law. *See Salmeron v. United States*, 724 F.2d 1357, 1361 (9th Cir.1983); *see also Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207, 1209 (5th Cir.1981) ("Creation of a federal rule rather than absorption of a state rule is appropriate where . . . the rights of the litigants and the operative legal policies derive from a federal source."); *cf. Jones v. Taber*, 648 F.2d 1201, 1203 (9th Cir.1981) (federal law governs waiver of section 1983 claim). We first consider whether as a termination of work agreement as the district court held, or whether as West Coast argues the agreement constitutes a valid waiver by Stroman of all legal claims against West Coast.

1. Whether "policies underlying [a federal] statute . . . render [a] waiver unenforceable is a question of federal law." *Newton v. rumery*, 480 U.S. 386, 392, 107, S.Ct. 1187, 1192, 94 L.Ed.2d 405 (1987). "[A] promise is unenforceable is the interest in its enforcement is outweighed in the circumstances by a public policy that would be harmed by enforcement of the November 1, 1985, agreement.

[2] The district court's conclusion that the November 1, 1985, agreement did not constitute a release of all claims against West Coast was based primarily on an analysis of the contract provisions. We therefore review the district court's determination de novo. *See Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 367-68 (9th Cir.1985)); *see also Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 417 (9th Cir.1984). We conclude that the agreement constitutes a clear and unambiguous waiver by Stroman of all legal claims against West Coast. Under the terms of the agreement, West Coast agreed to allow Stroman to leave the company on economic layoff so that he could collect unemployment benefits, clear Stroman's record, and limit the information given to prospective employers to the date of hire, rate of pay, and journeyman status. In exchange, Stroman agreed that the agreement would represent "a full and final settlement of any and all claims" arising out of his employment with West Coast. This language unambiguously indicates that Stroman intended to waive all claims against West Coast, including those then pending before the WSHRC and the EEOC.

The district court cited three reasons in support of its conclusion that the agreement was not a release of claims against West Coast. First, it relied on the absence of any mention of Title VII in paragraph six of the agreement. Contrary to the district court's conclusion, an agreement need not specifically recite the particular claims waived in order to be effective. The fact that Stroman's prior claims involved employment discrimination shows an intent to release Title VII claims under the agreement. This district court also based its interpretation of the agreement on the fact that Stroman was still employed by West Coast when he signed the agreement. We fail to see the relevance of Stroman's work status in light of the unambiguous language of the contract. We do not believe that whether Stroman was technically still employed when he signed the agreement has any bearing on the agreement's interpretation. We reach the same conclusion with respect to the

district court's observation that no lawyers were consulted in the drafting of the agreement. In any event, the district court's reasoning—that the absence of lawyers indicates that the agreement was not intended to relate to Stroman's legal claims—is undercut by Mosley's testimony at trial that he was aware of the substantive aspect of Title VII, although he did not know it by that name.

Our holding in *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338 (9th Cir.1987), *cert. denied*, — U.S. — , 108 S. Ct. 785, 98 L.Ed.2d 870 (1988), has little relevance to this case. In *Cassino* we concluded that a "settlement agreement and General Release" was properly admitted by district court under Fed.R.Evid. 408 as probative of the issue of discrimination. *Id.* at 1342. For whatever reason, whether the plaintiff's suit was barred by the release was not at issue.[2] Here, the court erred in holding that the agreement was probative only of discrimination. The validly executed document should have been interpreted as a release barring the suit. *Cassino* is irrelevant to this case based on our holding that the agreement constitutes a release of Stroman's legal claims.

Our conclusion that the November 1, 1985, agreement constitutes a release of all Stroman's legal claims does not end the inquiry. We must also determine whether Stroman's release of his discrimination claims was a "voluntary, deliberate and informed" waiver. *Salmeron*, 724 F.2d at 1361; *Taber*, 648 F.2d at 1203; *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n. 15, 94 S.Ct. 1011, 1021 n. 15, 39 L.Ed.2d 147 (1974). The district court's findings pertaining to whether Stroman's waiver is valid are reviewed under the clearly erroneous standards. *See Ahern*, 846 F.2d at 48; (citing *Worthy*, 756 F.2d at 1372).

[3] The determination of whether a waiver of Title VII was

2. The document was never signed. *Cassino*, 817, F.2d at 1341-42.

"Voluntary, deliberate, and informed" is "predicated upon an evaluation of several indicia arising from the circumstances and conditions under which the release was executed." *Coventry v. United States Steel Corp.*, 856 F.2d 514, 522 (3d Cir.1988); *see Salmeron*, 724 F.2d at 1362 (whether a release was voluntary must be determined from all the circumstances); *Taber*, 648 F.2d at 1203 (whether release was voluntary depends on both objective and subjective factors). Of primary importance in this calculation is the clarity and lack of ambiguity of the agreement, *see Coventry*, 856 F.2d at 455-56, the plaintiff's education and business experience, *see Coventry*, 856 F.2d at 523 (quoting *EEOC v. American Express Publishing Corp.*, 681 F.Supp. 216, 219 (S.D.N.Y.1988)), "the presence of a noncoercive atmosphere for the execution of the release," *Taber*, 648 F.2d at 1203; *see also Salmeron*, 724 F.2d at 1362; *Coventry*, 856 F.2d at 523, and whether the employee had the benefit of legal counsel, *see Slameron*, 724 F.2d at 1362; *Taber*, 648 F.2d at 1205; *Coverntry*, 856 F.2d at 523.

Based on his ruling that the agreement was a termination of work agreement, the district court precluded West Coast's counsel to make an offer of proof incorporative Mosley's affidavit. We conclude that the record as a whole sufficiently establishes the voluntariness of the agreement and no purpose would be served by remanding the case to the district court to reconsider this issue.

[4] We are satisfied that Stroman's release of "all claims" against West Coast under the November 1, 1985, agreement was a deliberate, voluntary, and knowing waiver of his Title VII and related claims. As we have previously indicated, the sixth paragraph of the agreement unambiguously indicates that Stroman intended to waive all legal claims against West Coast. We note that Stroman's work experience and college education were particularly relevant to our determination of a knowing and voluntary waiver. Although Stroman was not a sophistocated

businessman, his training in the Army and his business management-related community college degree convince us that Stroman possessed the education and skills necessary to understand that when he signed the agreement he waived all legal claims against West Coast.[3] He was sufficiently intelligent to understand that "all claims" meant all legal claims, including claims brought under Title VII.

Additionally, there is no evidence whatsoever that Stroman was coerced into signing the agreement. To the contrary, it was Stroman who approcahed Mosley asking to be placed on economic layoff. When the agreement initially was presented to Stroman, he was not coerced into signing it. In fact, Stroman did not sign it until several days later. Although he did not have an attorney read the agreement before signing it, ther is no evidence that Stroman was discouraged or precluded from doing so. In fact, Mosley, who was not permitted by the district judge to testify on this issue indicated in his affidavit that he asked Stroman whether he wished to have an attorney read the agreement before signing and that Stroman responded ahta he did not. We therefore conclude that the contractual agreement released Stroman's VII discrimination claims, and that the release was a deliberate and informed waiver.

III

For the foregoing reasons, we reverse the district court's judgment in favor of Stroman and order that judgment be entered in favor of West Coast and the action dismissed.[4]

3. Significantly, Stroman relied on this background in applying for a supervisory position at West Coast.

4. Because we hold that the November 1, 1985, agreement bars this suit, we need not address West Coast's other arguments.

REVERSED

TANG, Circuit Judge, dissenting in part:

I agree that the economic layoff agreement was sufficient to waive Stroman's Title VII claims. I dissent, however, from the majority's factual determination that Stroman waived his Title VII rights knowingly and voluntarily.

When an appellate court determines that a lower court made findings based upon an erroneous view of the law, the appellate court may not make contrary findings but must remand for new findings to be made in the light of the correct rule of law. *Pullman-Standard v. Swint,* 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). This is not a game where an incorrect understanding of the law by the fact finder results in automatic granting of relief. Such a rule would require ineffieient use of limited resources because the district court would have to make factual determinations in every case regardless of whether they are needed.

The only exception to that rule is if "the record permits only one resolution of the factual issue". *Id.* citing *Kelley v. Southern Pacific Co.,* 419 U.S. 318, 331-332, 94 S.Ct. 472, 479-80, 42 L.Ed.2d 498 (1974). The majority presumes that Stroman waived his Title VII rights knowingly and voluntarily but I do not believe that the record permits only one conclusion as to this matter.

I would therefore remand for a determination as the whether the waiver of Title VII rights was made knowingly and voluntarily. It is the fact-finder, not us, who should determine these issues in the first instance.

UNITED STATES COURT OF APPEALS
For The Ninth Circuit

GRADY M. STROMAN, Plaintiff-Appellee
vs.
WEST COAST GROCERY COMPANY, Defendant-Appellant

No. 88-3815
D.C. No. CV-86-528-T
ORDER

Before: WRIGHT, TANG, and WIGGINS, Circuit Judges

Judge Wright and Judge Wiggins have voted to deny the petition for rehearing. Judge Tang has voted to grant the petition for rehearing. Judge Tang and Judge Wiggins have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GRADY M. STROMAN, Plaintiff
vs.
WEST COAST GROCERY COMPANY, Defendant

No. C86-528T
FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER coming on for trial before the above-named court, sitting without a jury. Plaintiff appeared through his attorney of record, J. Michael Gallagher. Defendant appeared through its attorney, Timothy J. Whitters.

The court having taken testimony from both parties and having received exhibits from both partiese listened to argument of counsel and being fully informed in the premises now makes the following:

FINDINGS OF FACT

1. Section "Admitted Facts" of the Amended Joint Pretrial Order dated July 1987, to which the parties have agreed and have admitted as facts are herein incorporated by reference as if fully set forth.

2. Plaintiff is a black male.

3. Before commencing employment as West Coast Grocery, plaintiff had been a corporal and a transportation specialist in the United States Army.

4. During the course of his employment at West Coast Grocery, the plaintiff made numerous and repeated efforts to acquire training for a supervisor's position.

5. Defendant had no objective criteria to determine eligibility for training. Any criteria used by management to determine the qualifications of a prospective trainee were subjective and unknown to the general employees of the company, including the plaintiff. Defendant had no written policy regarding the prerequisites and qualifications for training of employees for supervisory positions.

6. Plaintiff never was allowed to receive the training in the scheduling office and without the training plaintiff would never have been considered for promotion by the defendant.

7. There is no correlation between th ejob of order selector, which plaintiff held, and supervisor. An order selector is a muscle job, loading and pushing pallets of groceries. A supervisor pusher paper.

8. The plaintiff inquired of Dave Hamlin, operations manager for the defendant, what he needed to do to get the supervisor's training. Hamlin told the plaintiff to read the book, "Up From Slavery", by Booker T. Washington. Plaintiff read the book.

9. Passages from "Up From Slavery" state that "Negroes must work four times harder than whites" to get ahead, and that other races must conform to the white man's world in order to coexist.

10. Plaintiff had one community college degree when he commenced employment at West Coast Grocery. While at West Coast Grocery, the Plaintiff acquired another business management-related community college degree.

11. Because of his race, the plaintiff found the working conditions of the defendant intolerable, thereby causing him to suffer stress on the job, and forcing him to take a unpaid medical leave in August 1985.

12. That because of defendant's discriminatory conduct, plaintiff suffered economic damages.

The foregoing is based upon a preponderance of the more credible evidence herein.

From the foregoing Findings of Fact, the court now makes the following

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject matter of this action pursuant to 42 U.S.C. §2000e, et. seq.

2. Job training is a "term and condition" of employment.

3. The defendant failed to articulate a legitimate, non-discriminatory business reason for not training the plaintiff and could not point to any objective assessments or criteria to support its decision that plaintiff was ot qualified for training.

4. The denial of training of the plaintiff by the defendant was the result of intentional racial discrimination against the plaintiff by the defendant.

5. The plaintiff was constructively discharged because of the actions and conduct of the defendant herein.

6. The plaintiff is entitled to monetary damages for back pay and benefits dating from August 4, 1985, in an amount of $101,372.48.

7. The plaintiff is entitled to front pay for five years from the date of judgment due to the corporate hostility toward the plaintiff, in the amount of $190,073.40.

8. The plaintiff is entitled to his costs and a reasonable attorney's fee for the prosecution of this action.

DATED at Tacoma, Washington this 20th day of April, 1988.

Jack E. Turner
UNITED STATES DISTRICT JUDGE